APPENDIX A

UNITED STATES COURT OF APPEALS

THIRD CIRCUIT

No. 92-5636

TRANSTECH INDUSTRIES, INC., a Delaware Corporation; KIN-BUC, INC., a Jersey Corporation; and FILCREST REALTY, INC., a New Jersey Corporation,

Plaintiffs-Appellees,

v.

A&Z SEPTIC CLEAN; AAA TANK; A ALFANTE; ABM DISPOSAL SERVICE; AM ENVIRONMENTAL; A. E. STANLEY MANUFACTURING COMPANY; ABSOLUTE FIRE PROTECTION, INC.; ACCURATE FORMING; ACTIVE OIL SERVICE; ADCHEM CORP.; ADRON, INC.; AERO NUTRONICS FORD; AETNA CHEMICAL CORPORATION; AIR PRODUCTS & CHEMICALS, INC.; AKZO CHEMICALS, INC.; ALCAN ALUMINUM CORPORATION; ALCOLAC INC.; ALL COUNTY SEPTIC; ALL COUNTY SERVICE CORP.; ALLIED-SIGNAL INC.; ALPHA METALS, INC.; AMER. BOOK STRATFORD; AMERADA HESS CORP.; AMERICAN CYANAMID CO.; AMERICAN PRODUCTS CO., INC.; AMERICAN STANDARD INC.; AMERICAN TRAILER; ANCHOR MOTOR FREIGHT; ANDY FIORE & SONS; ARCO PETROLEUM PRODUCTS; ASARCO, INC.; ASHLAND OIL INC.; ASSOCIATED MARBLE CO.; ASTRO PAK

CORPORATION; AT&T TECHNOLOGIES, INC.; ATI, INC.; ATLAS PAINTS; AUTOMATIC CONNECTOR, INC.; AVANTE PRODUCTS CORP.; AXTON-CROSS CO., INC.; B&L INDUSTRIAL SERVICE; BAD PALLET CO.; BARCLAY CLEANING CO.; BARON BLAKESLEE; BAROUH EATON ALLEN CORP.; BASF CORP.; BATES MANUF. CO.; BAXTER HEALTHCARE CORP.; BARONNE BARR. & DRUM; BEACON FAST FREIGHT CO., INC.; BECTON, DICKINSON AND CO.; BENDIX CORP.; BENJAMIN MOORE & CO.; BERGEN MACHINE & TOOL; BERKELEY CHEM. CO.; BEST DISP. & DRUM SERV.; BEST DISPOSAL; BEST FOODS RESEARCH CNTR.; BFT; BIDDLE SAWYER CORP.; BIG 3 TRUCK PLAZA; BIOCRAFT LAB. INC.; BOC GROUP INC.; BORDEN, INC.; BORG-WARNER CHEMICALS, INC.; BOROUGH OF WALLINGTON; BOSTITCH INC.; BROOKDALE SHOP-RITE; BROWN STONE INN; BROWNING-FERRIS IND. OF ELIZ. NJ; C&R TRUCKING, CO.; CPS CHEMICAL CO.; CJR CHEMICAL CO.; CPC INTER'L, INC.; CADBURY CO.; CAN MEG CO.; CARBOLINE CO.; CARPENTER TECH. CORP.; CECOS INTERN'L, INC.; CENTRAL JERSEY ASSOC.; CENTRAL JERSEY DISPOSAL; CESCO COMPANY; CHAS PETZER INC.; CHEM CLEANING SERV.; CHEM TROL POLLUTION; CHEMICAL CONTROL CO.; CHEMICAL LEAMAN TANK LINES, INC.; CHEMLINE CORP.; CHEMQUID DISPOSAL INC.; CHESEBROUGH-PONDS; CHEVRON CHEMICAL CO.; CHEVRON U. S.A. INC.; CIBA-GEIGY CORP.; CITY SERV. OIL CO.; CLAIROL, INC.; CLARK HAULERS; CLEAN WATER, INC.; CLEVELAND WRECKING; COASTAL SERVICES, INC.; COASTAL TANK LINES; COCA-COLA FOODS; COLGATE-PALMOLIVE CO.; COLONY FURNITURE CO.; COLUMBIA CORRUGATED; COLUMBIAN RIBBON;

CON-LUX COATINGS, INC.; CONTINENTAL CAN CO., INC.; CONTINENTAL CHEM CO.; CONTINENTAL OIL; COOPER INDUSTRIES, INC.; COVINO'S INDUSTRIAL DISP. SERV., INC.; CRANE & CO., INC.; CURTIS NUCLEAR; CURTISS-WRIGHT CORP.; CUSTOM BUILDERS; CUSTOM DISPOSAL; D&C CONTRACTING; DART INDUSTRIES; DARWORTH CO.; DATA GENERAL CORP.; DELCO REMY; DELEET MERCHANDISING CORP.; DELMARVA IND. CORP.; DIBELLA SANITATION; DOCK WATCH QUARRY; DONADIA BROTHERS; DONALD HARTMAN; THE DOW CHEMICAL CO.; DREW CHEM CORP.; DUANE MARINE CORP.; DUBOIS CHEMICALS, INC.; DURO-TEST CORP.; EJ GAISSER INC.; E.I. DUPONT DE NEMOURS AND CO., INC.; E.R. SQUIBB & SONS, INC.; EASTCOAST POLLUTION CONTROL, INC.; EASTERN IND. CORP.; EASTERN INDUSTRIES; ECOLAB, INC.; EDAL INDUSTRIES, INC.; EGYPTIAN LACQUER; ELIZABETH DISPOSAL; ELMWOOD TANK & PIPING CORP.; ENVIRONMENTAL RECOVERY; EQUADORIAN LINE, INC.; EXXON CORP.; FETTE FORD, INC.; FISHER SCIENTIFIC CO.; FLEXTRAP; FLINTKOTE CORP.; FLOCK INDUSTRIES; FLORENCE IND. RECONTO; FLUID PACKAGING CO., INC.; FMC CORP.; FORD MOTOR CO.; FRANK FOGLIA JR.; FRANK MUGGID BUILDER; FREEHOLD CARTAGE; FRISCH & CO.; FRITSZCHE D&D; FYN PAINT & LACQUER; GAESS ENVIRONMENTAL SER.; GAF CORP.; GALAXY CHEMICAL; GANES CHEMICALS, INC.; GATX TERMINALS CORP.; GENERAL CABLE CORP.; GENERAL CERAMICS INC.; GENERAL ELECTRIC CO.; GENERAL MOTORS CORP.; GENERAL SEWER SERVICE; GENERAL WAREHOUSE; GLENWALI; GM ASSEMBLY DIV.; GOODALL RUBBER CO.; GOODYEAR TIRE & RUBBER CO.; GOULD, INC.;

GREYHOUND CORP.; GUARD ALL CHEMICAL CO., INC.; GUARDIAN, INC.; GULTON INDUSTRIES, INC.; H&F CHEMICAL CO.; H&S CHEMICAL CO.; HARDMAN INC.; HATCO CHEMICAL DIVISION; HATFIELD WIRE & CABLE; HAVEN CHEM.; HENKEL INC.; HERCULES, INC.; HEXCEL CORP.; HI-PURE CHEMICALS, INC.; HIGH VOLTAGE ENGIN. CORP.; HIGHWAY DISPOSAL; HOECHST CELANESE CORP.; HOFFMANN-LA ROCHE INC.; HOLIDAY INN REST.; HOWARD FUEL CO.; HOWMEDICA; HPH CONSTRUCTION; HYDROCARBON RESEARCH, INC.; IBM CORP.; ICI AMERICAS INC.; ICI UNITED STATES; ILFORD PHOTO CORP.; IMPERIAL OIL CO., INC.; IMPORTICO, INC.; IND SURPLUS CHEMICAL INC.; INDUSTRIAL SILVER CO.; INMONT CHEMICAL; INMONT CORP.; INSFLEX CO.; INSTEL CORP.; INTER'L FLAVORS AND FRAG., INC.; INTERDATA CORP.; INTERSTATE CHEM. CO.; IRON OXIDE CORP.; ITT CORP.; J BASS & CO., INC.; J. FILTRESTO SANIT.; J.M. HUBER CORP.; J.T. BAKER, INC.; JAMECO CORP.; JAMECO INDUSTRIES; JAMES P. HORAN, INC.; JERSEY SANITATION; JOHN DUSENBERY CO., INC.; JOHN ERRICO DISPOSAL CO.; JOHN H. COONEY, INC.; JOHNSON & JOHNSON; JOHNSON MATTHEY, INC.; KAY-FRIES, INC.; KERRY TIRE; KEUFFEL & ESSER CO.; KEY OIL CO.; KNOLL FINE CHEMICAL; KOPPERS CO., INC.; KRAFT CONTAINER; KTK CORP.; L&J DRUM CO.; L.E. CARPENTER & CO.; LAWRENCE MCFADDEN CO.; LAWSON PRODUCTS, INC.; LEHAND SALES; LEHIGHTON ELEC., INC.; LEKSI, INC.; LELAND INDUSTRIES; LELAND TUBE CO.; LEVER BROTHERS CO.; LINCOLN METALS PRODUCTS; LINDEN MOTOR FRGHT CO., INC.; LIQUID REMOVAL SER.; LUCAS INDUSTRIES, INC.; LUMAS CO.; M&F CHEMICAL CO.; M&T CHEMICALS,

INC.; MAAS & WALDSTEIN; MACARTHUR PETROLEUM; MADISON TOWNSHIP; MAKAR TRUCKING INC.; MALLA INC.; MALLINCKRODT CHEM.; MANNON EXCAV. & PAVING CO., INC.; MARBUN DIVISION; MARISOL, INC.; MARPAK ASSOC.; MARVIN JONAS INC.; MAYCO OIL & CHEMICAL; MCGILLON EXCAVATING; MCKAYS TRUCKING; THE MEARL CORP.; MERCER RUBBER; MERCK & CO., INC.; METRO CONTAINER CO.; METROL OIL & CHEM. CORP.; METROL PETRO CHEM. CO.; MICHAELS INDUSTRIAL DISPOSAL; MIDDLESEX CONTAINER; MIDLAND PROC., INC.; MIDWEST EMERY; MILLMASTER; MOBILE OIL CORP.; MONARCH CHEMICAL; MONMOUTH MEDICAL CTR; MONROE CHEMICAL CORP.; MONSANTO CO.; MONTVAL LABS; MORTON THIOKOL INC.; MUTPIE TRUCKING; N&N TRUCKING; N. AMER. METAL & CHEM.; NATIONAL CONVERTERS; NATIONAL GYPSUM CO.; NATIONAL STARCH & CHEM. CORP.; NEPERA, INC.; NIAGARA SANITATION CO., INC.; NL INDUSTRIES, INC.; NORTON & SON, INC.; NUTEX CORP.; THE NUTRASWEET CO.; OAKITE PRODUCTS, INC.; OCCIDENTAL CHEMICAL CORP.; THE OKONITE CO.; OLIN CORP.; ORGANON, INC.; THE ORMAND SHOPS, INC.; ORTHO DIAGNOSTICS; PAMARCO, INC.; PAQUET ONEIDA, INC.; PENN CENTRAL CORP.; PERK CHEMICAL CO., INC.; PERSONAL PROD. CO.; PFIZER, INC.; PHARMAC. LABS INC.; PHELPS DODGE CORP.; PHILIP A. HUNT CHEM.; PIONEER ROOFING CO.; PISCATAWAY DISPOSAL; PITNEY BOWES, INC.; POINT PLEASANT HOSPITAL; POLAROID CORP.; POLYMER MATERIALS, INC.; POPE CHEMICAL CO.; PORTFOLIO ONE, INC.; PQ CORPORATION; PRINCETON NURSERIES; PROCEDYNE CORP.; PROCTER & GAMBLE MANF. CO.;

PUBLIC SERV. ELEC. & GAS CO.; PVO INTERNATIONAL, INC.; QUAKER CHEMICAL CORP.; QUALITY CONTAINER; R&R SANITATION; R. W. EAKEN, INC.; RADIAC RESEARCH CORP.; RAY GUYS TRAILER; RCA CORP.; REAGENT CHEMICAL & RESEARCH; REICHHOLD CHEMICALS, INC.; REITER DRUM & BARREL; REVERE COOPER & BRASS, INC.; REYNOLDS METALS CO.; REHEEM MANUFACTURING CO.; RICHARDS TRUCKING; RIVERVIEW HOSPITAL; ROLLINS ENV. SERV. (NJ), INC.; RUPACO PAPER CORP.; RUSSELL REID CORP.; RUSSELL REID CO.; RUSSELL-STANLEY CORP.; RUTGERS-THE STATE UNIVERSITY; RYCOLINE PRODUCTS, INC.; S&W TRUCKING; SAM TRUCKING CO.; SB PENICK COMPANY; SSS CONSTRUCTION; SAB NIFE, INC.; SAFETY LIGHT CORP.; SAFETY-KLEEN ENVIROSYSTEMS CO.; SAMSON TANK CLEANING; SANDOZ CHEMICALS CORP.; SANTY; SCHERING CORP.; SCIENTIFIC CHEM. PROC.; SCOTT PAPER CO.; SEALAND ENVRNMTL.; SEALED AIR CORP.; SEN-DURE PRODUCTS, INC.; SEQUA CORP.; SETON HALL UNIVERSITY; SHELL CHEMICAL CO.; SHULTON INC. CONSUMER; SIEGERIED CHEMICAL; SIKA CORP.; SINCLAIR VALENTINE; SMITH KLINE BECKMAN CORP.; SOLVENTS DISTILLERS; SOLVENTS RECOV. SERV. OF NJ, INC.; SOUTHERN CALIF. CHEM. CO., INC.; SPECTRSERV., INC.; ST. BARNABAS ME. CNTR.; ST. JOE PAPER CO.; ST. THOMAS AQUINAS CL.; STALEY CHEMICAL CO.; STANDARD TANK CLEAN; STANDARD TOOL & MFG. CO.; STANLEY CHEMICAL CO.; THE STANLEY WORKS; STARCH CONTAINER CO.; STARLIGHT TRADING; STAUFFER MANAGEMENT CO.; STEPAN COMPANY; SUN RISE FASHION INC.; SYBRON TRANSITION CORP.; TAPPAN

TANKER; TAU LABORATORIES; TENNECO RESINS, INC.; TEXACO BUTADIENE CO.; TEXACO, INC.; TEXTRON, INC.; TIME--DC; TIZON CHEMICAL CORP.; TOMS RIVER CHEM. CORP.; TUCK INDUSTRIES, INC.; U. S. METALS REFINING; UNION CAMP RESEARCH; UNION CARBIDE CORP.; UNION TEXTILE; UNIROYAL CHEM. CO., INC.; UNISYS CORP.; UNITED CARTING; UNITED STATES LINES; UNITED STATES METALS REFINING CO.; UNITED TECHNOLOGIES CORP.; UNIVERSAL SANIT.; UOP CHEM.; THE UPJOHN CO.; US SAMICA CORP.; VAMP CHEM; VANGUARD VENTRON CHEMICAL; VILLAGE CESSPOOL; VINELAND CHEM. CO., INC.; W. W. ANDRESS CO.; WALL TRENDS INC.; WALTER KIDDE; WALTZ ENTERPRISES; WESTERN UNION; WESTINGHOUSE ELECTRIC CORP.; WESTON CHEMICAL; WESTRON CHEMICAL CO.; WHITE CHEMICAL CORP.; WHITE ROSE TEA; WHITMOYER LABS; WINCHESTER WESTRON; WITCO CHEMICAL CO.; WOODSTEIN & KLURMAN; Z&W ENTERPRISES, INC.; JOHN DOE (1-500) STANDARD SPILL; ALUMINUM BILLETS; MACARTHUR PETROLEUM & SOLVENT CO. INC.; CENTRAL JERSEY CLNRS; CLEAN SPRAY; JAMES E. MCNULTY; LCP CHEMICAL & PLAST; LESTER SUMMERS; SAND GRAVEL-STONE CO.; MEADOWS FACILITY POST O; TENNECO CHEM; WESTERN CHEMICAL CO.; GERMAN SHEPARD; Z & W MAZDA; SYBRON CHEMICALS; UNITED STATES METAL REFINING CO.; GENERAL SEWER SERVICE Mayco Oil & Chemical Company; Astro Pak; AT&T Technologies Inc., by its successor American Telephone and Telegraph Company, Inc.; Biocraft Laboratories, Inc.; Chesebrough-Pond's USA Co.; CPC International, Inc., including Best Foods division and Penick Corporation successor to S.B. Penick Company; Fluid Packaging

Co., Inc.; FMC Corporation; Ganes Chemicals, Inc.; General Electric Company; Hexcel Corporation; Huls America Inc.; IBM Corporation; John H. Cooney, Inc.; J. T. Baker, Inc.; Lever Brothers Co.; Marisol, Inc.; Mobil Oil Corp.; Occidental Chemical Corporation; Phelps Dodge Corporation; Procedyne Corporation; Procter & Gamble Manufacturing Company; Reynolds Metals Company; Russell Reid Company; Safety-Kleen Envirosystems Company; Saft Nife, Inc. (sued as SAB Nife Inc.); Sequa Corporation (formerly Sun Chemical Corporation); Siegfried Chemicals; Smithkline Beecham Corporation; Spectraserv, Inc. (formerly Modern Transportation Co.); Stroh Brewery Company; Sybron Transition Corp.; Sybron Chemicals, Inc., including as trade names Gamlen Chemical and Tanatex; and Witco Corporation (collectively "Settlor-Defendant Appellants") Appellants

[Filed September 17, 1993]

PRIOR HISTORY:

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY;

(D.C. Civ. No. 90-02578).

COUNSEL: George M. Newcombe, Esquire, David B. Smallman, Esquire, Elizabeth A. Fuerstman, Esquire, Simpson, Thacher & Bartlett, 425 Lexington Avenue, New York, New York 10017 Steven L. Lapidus, Esquire, Robinson, St. John & Wayne, One Gateway Center, Newark, New Jersey 07102, Attorneys for Mayco Oil & Chemical Company, Appellant. Henry B. Fitzpatrick, Esquire, Stephen P. Chawaga, Esquire,

Fitzpatrick & Tanker, One Logan Square, Suite 3001, Philadelphia, PA 19103, Attorneys for Astro Pak, Appellant. Joseph J. Strelkoff, Esquire, 131 Morristown Road, Basking Ridge, New Jersey 07920-1650, Attorney for AT&T Technologies, Inc. by its successor American Telephone and Telegraph Company, Inc. Appellant. Stephen P. Kramer, Esquire, Proskauer, Rose, Goetz & Mendelsohn, 1585 Broadway, New York, New York 10036, Attorneys for Biocraft Laboratories, Inc., Appellant. Daniel M. Steinway, Esquire, Catherine J. Serafin, Esquire, Carl A. Salisbury, Esquire, Anderson, Kill, Olick & Oshinsky, 2000 Pennsylvania Avenue, N.W., Suite 7500, Washington, D. C. 20006, Attorneys for Chesebrough-Pond's USA Company and Lever Brothers Co., Appellants. Steven A. Kunzman, Esquire, Bivona, Cohen, Kunzman, Coley, Yospin, Bernstein & DiFrancesco, 15 Mountain Boulevard, Warren, New Jersey 07059-6327, Attorneys for CPC International, Inc. including Best Foods division and Penick Corporation successor to S. B. Penick Company, Appellant. Steven J. Eisenstein, Esquire, Lum, Hoens, Conant, Danzis & Kleinberg, 103 Eisenhower Parkway, Roseland, New Jersey 07068-1049, Attorneys for Fluid Packaging Co. Inc., Appellant. John F. Stillmun, Esquire, FMC Corporation, 1735 Market Street, Philadelphia, PA 19103, Attorney for FMC Corporation, Appellant. Tod W. Read, Esquire, Edward A. Kurent, Esquire, Gilberg & Kurent, 1250 Eye Street, N.W., Suite 600, Washington, D.C. 20005, Attorneys for Ganes

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Maiden Lane, New York, New York 10038, Attorneys for Occidental Chemical Corporation and Safety-Kleen Envirosystems Company Appellants. John S. Agar, Esquire, Skadden, Arps, Slate, Meagher & Flom, 1440 New York Avenue, N.W., Washington, D.C. 20005, Attorneys for Phelps Dodge Corporation, Appellant. James Bickford, Esquire, 172 Sayre Drive, P.O. Box 7081, Princeton, New Jersey 08543, Attorney for Procedyne Corporation, Appellant. Renata M. Manzo, Esquire, Reynolds Metals Company, 6601 West Broad Street, Richmond, Virginia 23230, Attorney for Reynolds Metals Company, Appellant. Lila Wynne Williams, Esquire, Slimm, Dash & Goldberg, 216 Haddon Avenue, P.O. Box 2222, Westmont, New Jersey 08108-2886, Attorneys for Russell Reid Company, Appellant. William F. Paquin, Esquire, Haronian, Paquin, Bramley & Harrington, Inc., 190 Commerce Drive, Warwick, Rhode Island 02886, Attorneys for Saft Nife, Inc. (sued as SAB Nife, Inc.), Appellant. Richard J. Kagan, Esquire, Leonard & Butler, 300 Lanidex Center, Parsippany, New Jersey 07054, Attorneys for Sequa Corporation (formerly Sun Chemical Corporation), Appellant. Patricia A. Barald, Esquire, Covington & Burling, 1201 Pennsylvania Avenue, N.W., P.O. Box 7566, Washington, D.C. 20044, Attorneys for Smithkline Beecham Corporation, Appellant. Max Spinrad, Esquire, Miele, Cooper, Spinrad & Kronberg, 90 Millburn Avenue, Millburn, New Jersey 07041, Attorneys for Spectraserv, Inc. (formerly Modern

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Dante J. Romanini, Esquire, Richard M. Cohen, Esquire, Kozlov, Seaton, Romanini & Brooks, P.C., 1940 Route 70 East, Suite 200, Cherry Hill, New Jersey 08003, Attorneys for Transtech Industries, Inc.; Kin-Buc, Inc.; and Filcrest Realty, Inc., Appellees.

Myles E. Flint, Esquire, Acting Assistant Attorney General, Anne S. Almy, Esquire, Catherine R. McCabe, Esquire, United States Department of Justice, Environmental Enforcement Section, Ben Franklin Station, P.O. Box 7611, Washington, D.C.

20044, Attorneys for United States of America, Amicus-appellee.

JUDGES: Before: SCIRICA, NYGAARD, and WEIS, Circuit Judges.

OPINION BY: WEIS

OPINION: OPINION OF THE COURT

Weis, Circuit Judge.

In this case brought under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the district court rejected appellants' contention that, having entered into a settlement with the Environmental Protection Agency, they were relieved of responsibility for cleanup expenses incurred by the owners of a landfill. We conclude that the district court's denial of summary judgment and refusal to enforce a settlement is a collateral order not appealable under the Cohen exception. Accordingly, we will dismiss the appeal.

The owners and operators of the Kin-Buc Landfill in New Jersey brought this suit in 1990 seeking contribution for costs incurred in cleaning up that hazardous waste site. The 445 named defendants are generators, transporters, or haulers of hazardous waste who are alleged to be potentially responsible parties liable to plaintiffs for past expenses incurred at the site, as well as for anticipated future costs.

Approximately 200 of the defendants ("settlor-defendants") moved for summary judgment asserting that, as a result of a settlement agreement with the Environmental Protection Agency embodied in a 1988 consent decree, they were not liable to plaintiffs. The district court denied the motion concluding that the

consent decree covered only costs incurred by the United States and did not purport to absolve the settlor-defendants from liability for contribution to plaintiffs for their separate expenditures.

Under CERCLA, parties who have "resolved [their] liability to the United States . . . in a [] . . . judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement."

42 U.S.C. § 9613(f)(2). The court concluded, however, that the application of that statutory provision was limited by the terms of the settlement agreement and that "in no way was the government absolving defendants from all liability to any other party for the ongoing problems at the site." The court then denied settlor-defendants' request for certification of a controlling question of law under 28 U. S. C. §§ 1292(b). Approximately 35 of the settlor-defendants have appealed.

Settlor-defendants contend that this Court has jurisdiction under the "collateral order" doctrine articulated in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-47, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949). In that case, the Court defined an exception to the final judgment requirement of 28 U. S. C. § 1291 as a "small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Id. at 546.

In *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 57 L. Ed. 2d 351, 98 S. Ct. 2454 (1978), the Court listed three criteria that must be present for an interlocutory order to come within Cohen's narrow exception to the final-judgment rule. The order must (1)

conclusively determine the disputed question; (2) resolve an important issue completely separable from the merits of the action; and (3) be effectively unreviewable on appeal from a final judgment. Id. at 468.

The Supreme Court has been chary of expanding the Cohen exception any further. In *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 498, 104 L. Ed. 2d 548, 109 S. Ct. 1976 (1989), the Court found that an interlocutory order denying enforcement of a contractual forum-selection clause did not satisfy the third requirement of the collateral order doctrine. The Court reiterated its "general rule" that an order is "effectively unreviewable" only if it "involves an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." 490 U.S. 495 at 498-99 (internal quotations omitted). That an erroneous ruling may result in additional litigation expense "'is not sufficient to set aside the finality requirement imposed by Congress' [in section 1291]." Id. at 499 (quoting *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 436, 86 L. Ed. 2d 340, 105 S. Ct. 2757 (1985))

An immunity to civil suit itself is a right that can be lost if not enforced before trial. Consequently, an order rejecting official immunity is immediately appealable, *Mitchell v. Forsyth*, 472 U.S. 511, 525, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985), as is one denying effect to the protection of the "Speech or Debate Clause," *Helstoski v. Meanor*, 442 U.S. 500, 506-08, 61 L. Ed. 2d 30, 99 S. Ct. 2445 (1979). See also *Abney v. United States*, 431 U.S; 651, 662, 52 L. Ed. 2d 651, 97 S. Ct. 2034 (1977) (order denying right not to stand trial on double jeopardy grounds is appealable before final judgment).

Although an order denying immunity to suit falls within the narrow confines of the "collateral order" doctrine, that exception may not be allowed to swallow the rule. In *Van Cauwenberghe v. Biard*, 486 U.S. 517, 100 L. Ed. 2d 517, 108 S. Ct. 1945 (1988), the Court remarked that "in some sense, all litigants who have a meritorious pretrial claim for dismissal can reasonably claim a right not to stand trial." Id. at 524. The Court further reasoned:

> "Because of the important interests furthered by the final-judgment rule . . . and the ease with which certain pretrial claims for dismissal may be alleged to entail the right not to stand trial, we should examine the nature of the right asserted with special care to determine whether an essential aspect of the claim is the right to be free of the burdens of a trial."

Id. at 524-25.

In *Van Cauwenberghe*, the Court assumed the validity of defendant's contention that he was immune from service of process, but held, nonetheless, that the district court's denial of his motion to dismiss was not immediately appealable. Id. at 524. "Because the right not to be subject to a binding judgment may be effectively vindicated following final judgment, we have held that the denial of a claim of lack of jurisdiction is not an immediately appealable collateral order." Id. at 527.

We have followed the Supreme Court's admonition and "have consistently construed the Cohen exception narrowly rather than expansively." *Lusardi v. Xerox Corp.*, 747 F.2d 174, 176-77 (3d Cir. 1984); see also *Praxis Properties, Inc. v. Colonial Sav. Bank*, s.e.a., 947 F.2d 49, 54 (3d Cir. 1991). *Demenus v. Tinton 35 Inc.*,

873 F.2d 50, 53 (3d Cir. 1989). We considered the problem in *Borden Co. v. Sylk*, 410 F.2d 843 (3d Cir. 1969), observing:

> "We have detected what appears to be an irresistible impulse on the part of appellants to invoke the 'collateral order' doctrine whenever the question of appealability arises. Were we to accept even a small percentage of these sometime exotic invocations, this court would undoubtedly find itself reviewing more 'collateral' than 'final' orders."

Id. at 845-46. For a comprehensive review of the collateral order doctrine, see 15A Charles A. Wright et al., Federal Practice and Procedure § 3911 to 3911.5 (1992).

Turning then to the issues presented in the case before us, we first consider the factors set out in *Coopers & Lybrand*, 437 U.S. at 468. We may assume that the district court's order is final because there is no indication that it was tentative or less than the last word on the settlor-defendants' construction of the consent decree. We have substantial doubts, however, that the issues settlor-defendants raised in defense of appellate jurisdiction under the collateral order doctrine are distinct from the underlying merits of the lawsuit. We need not linger long on this point, however, because it is quite clear that the settlor-defendants' contentions can be raised on direct appeal after final judgment. Therefore, the interlocutory order fails to meet all of the requirements needed to fall within Cohen's narrow exception to the final-judgment rule.

Recognizing that deficiency, settlor-defendants assert that the consent decree grants them immunity from suit, relying on a line of cases holding that interlocutory orders denying enforcement of settlement or release agreements are immediately appealable. See

Forbus v. Sears, Roebuck & Co., 958 F.2d 1036, 1039-40 (11th Cir. 1992); *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217, 219-20 (5th Cir. 1991); *Janneh v. GAF Corp.*, 887 F.2d 432, 436 (2d Cir. 1989); *Towers Hotel Corp. v. Rimmel*, 871 F.2d 766, 769-70 (8th Cir. 1989); cf. *Chaput v. Unisys Corp.*, 964 F.2d 1299, 1301 (2d Cir. 1992). Those cases are factually distinguishable from the case before us in that they involved disputes over settlement agreements between plaintiffs and defendants. Here, however, the settlement agreement was between settlor-defendants and the EPA -- an entity that is not a party to this case. Plaintiffs are not alleged to have reached any agreement with the settlor-defendants on the claim incorporated in the complaint.

More significant, however, is our disagreement with the decisions in *Forbus, Grillet, Janneh* and *Towers*. We believe that they undermine the final-judgment rule and expand the immunity concept beyond that which the Supreme Court has approved. In our view, *Desktop Direct, Inc. v. Digital Equip. Corp.*, 993 F.2d 755 (10th Cir. 1993), more closely conforms to the Supreme Court's teaching.

In *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 103 L. Ed. 2d 879, 109 S. Ct. 1494 (1989), the Supreme Court cautioned that one should not "play word games with the concept of a 'right not to be tried.'" Id. at 801. The Court went on to explain that "[a] right not to be tried in the sense relevant to the Cohen exception rests upon an explicit statutory or constitutional guarantee that trial will not occur . . . ." Id.

Cases involving claims of official immunity have listed interests that justify permitting freedom from suit, such as "'the general costs of subjecting officials to the risks of trial -- distraction of officials from their governmental duties, inhibition of

discretionary action, and deterrence of able people from public service.'" *Mitchell*, 472 U.S. at 526 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 816, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982)). No such public policy considerations are present in the case at hand.

In *Desktop Direct*, the United States Court of Appeals for the Tenth Circuit declined to review an order vacating a settlement between plaintiff and defendant. The Court concluded that the Cohen doctrine should "not be expanded without compelling justification. A claimed right to avoid litigation based on a private contract to that effect does not meet this standard." Id. at 760. The Court also observed that it did not "see how a private settlement contract is significantly different from the contracted forum selection clause the Supreme Court refused to enforce through interlocutory appeal in Lauro Lines." Id.

Settlor-defendants seek some support from CERCLA, but we are not convinced. Indeed, we note that the language of section 9613 (f)(2) supplies another basis for our conclusion that settlor-defendants have no immunity from suit. That section provides that parties settling with the United States "shall not be liable for claims for contribution regarding matters addressed in the settlement." 42 U.S. C. § 9613(f)(2). We believe it is significant that the statute does not include the word "immunity," but merely refers to a party's "liability."

In *Brown v. Grabowski*, 922 F.2d 1097, 1109 (3d Cir. 1990), we refused to review an interlocutory order rejecting claims of official immunity based on state law. Although state law conferred immunity from liability, we found no authority that granted immunity from suit as well. Id. at 1108.

As the Court pointed out in *Van Cauwenberghe*, undoubtedly there is value to the litigant "'in triumphing before trial, rather than after it.'" 486 U. S. at 524 (quoting *United States v. MacDonald*, 435 U.S. 850, 860, & n.7, 56 L. Ed. 2d 18, 98 S. Ct. 1547 (1978)). Ordinarily, however, the benefits of the final-judgment rule, including discouragement of piecemeal appeals, efficient utilization of judicial resources, and prevention of delay and ultimate disposition, take precedence. Id. at 521 n.3, 524-25. If settlor-defendants had a right to an appeal, it would be difficult to deny one to other litigants who can assert the benefit of such affirmative and dispositive defenses as claim or issue preclusion, statute of limitations, lack of subject matter jurisdiction, and the like. In *Powers v. Southland Corp.*, 4 F.3d 223 (3d Cir. 1993), we held that an order joining a party despite the lapse of the statute of limitations was not appealable as a collateral order. We observed: "While it could be argued that a statute of limitations entails a right not to be sued after the expiration of the limitations period, that contention was rejected by this court in connection with a criminal statute of limitations." *Powers*, No. 92-1562, slip op. at 18 (citing *United States v. Levine*, 658 F.2d 113, 124-29 (3d Cir. 1981)).

Levine presented an even stronger case for construing the lapse of the statute of limitations as an immunity from prosecution and trial, but, nevertheless, this Court held that the Cohen exception did not apply. *Levine*, 658 F.2d at 129.

We are persuaded that orders denying summary judgments on claims of immunity from trial based on releases or settlements are not appealable as Cohen collateral orders. Consequently, we lack jurisdiction and will dismiss this appeal.

Settlor-defendants have requested us to consider their appeal, in the alternative, as a petition for mandamus. We do so, but deny the petition for failure to assert a cognizable basis for relief.

The appeal will be dismissed without prejudice. The petition for mandamus will be denied.

APPENDIX B

TRANSTECH INDUSTRIES, INC., et. al.	:	
	:	Civil Action No. 90-2578
Plaintiffs		(Harold A. Ackerman)
	:	
v.		O P I N I O N
	:	
A & Z SEPTIC CLEAN, et. al.	:	
Defendants.	:	

Plaintiffs in this action are owners and/or operators of a hazardous waste site. Having spent approximately $13 million to clean up the site, plaintiffs seek through this action contribution costs from the 440 users of the site. Over two-hundred of the 440 defendants had previously settled a claim for clean-up costs brought by the federal government. Accordingly, these defendants, citing a federal statutory provision, filed a motion to dismiss the complaint for a failure on the part of the plaintiffs to allege a set of facts upon which relief can be granted. The motion is opposed by plaintiffs and by the other, non-settling, defendants. Additionally, defendant Clairol (one of the settling defendants) moves to strike the plaintiffs' complaint, and, in the alternative, for summary judgment pursuant to Rule 56. I will address each motion separately.

SETTLOR DEFENDANTS MOTION

I. Standard for Summary Judgment

As an initial matter, Federal Rule of Civil Procedure 12(b) states that

> If, on a motion asserting the defense . . . to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

In their motion papers, defendants rely heavily on language of a consent decree they entered into with the United States government, a document that was not a part of the pleadings.[1] Thus, parties were notified that I am treating their motion as a Rule 56 motion for summary judgment. All parties were given an opportunity to submit additional relevant materials under Rule 56.

Construing this motion as one for summary judgment, I note that summary judgment may be granted only if the pleadings, supporting papers, affidavits, and admissions on file, when viewed with all inferences in favor of the nonmoving party, demonstrate that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. See *Todaro v. Bowman*, 872 F.2d 43, 46 (3rd Cir. 1989); *Chippolini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3rd Cir.), cert. dism'd, 483 U.S. 1052 (1987). Put differently, "summary judgment may be granted if the movant shows that there exists no genuine issues of material fact that would permit a reasonable jury to find for the nonmoving party." *Miller*

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1. The consent decree was approved in *United States v. Absolute Fire Protection Co., Inc.*, No. 88-207 (ALJ) (D.N.J. Aug. 1, 1988).)

v. Indiana Hospital, 843 F.2d 139, 143 (3rd Cir. 1988), cert. denied, 488 U.S. 870 (1988). An issue is "genuine" if a reasonable jury could possibly hold in the nonmovant's favor with regard to that issue. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A fact is material if it influences the outcome under the governing law. Id. at 248.

Within the framework set out above, the moving party essentially bears two burdens: First, there is the burden of production, of making a prima facie showing that it is entitled to summary judgment. This may be done either by demonstrating there is no genuine issue of fact and that as a matter of law, the moving party must prevail or by demonstrating the nonmoving party has not shown facts relating to an essential element of the issue for which it bears the burden. Once either showing is made, this burden shifts to the nonmoving party who must demonstrate facts supporting each element for which it bears the burden as well as establish the existence of genuine issues of material fact. Second, there is the burden of persuasion. This burden is a stringent one which always remains with the moving party. If there remains any doubt as to whether a trial is necessary, summary judgment should not be granted. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 330-33; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-61 (1970); Advisory Committee's Notes on Fed. Rule of Civ. Pro. 56(e), 1963 Amendment; see generally C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §2727 (2nd ed. 1983).

With this standard in mind, I turn to the facts surrounding this motion.

II. Background

This case turns on an interpretation of the Comprehensive Environmental Response, Liability and Compensation Act (CERCLA), a complex piece of federal legislation passed in 1980, significantly amended in 1986, and designed to effectuate quick cleanups of hazardous waste sites. At issue here is a site known as Kin-Buc (the "Site"), which has been a trash disposal site in New Jersey since 1947. During 1968, the Site began operating as a state-approved landfill for hazardous waste disposal, and continued as such until 1976, when the state of New Jersey revoked Kin-Buc's operating permit and enjoined any further hazardous waste disposal.

Following the Site's closure to hazardous waste, the Environmental Protection Agency ("EPA") began pursuing statutory remedies to make the Site safer and cleaner. Specifically, the EPA filed an action against the owners and operators of the Site (which included plaintiffs in the instant action), which was designed to force those responsible for the Site's situation to engage in clean-up operations. The action was settled on January 30, 1980, when the owner/operators (again, including plaintiffs) agreed to perform and bear the costs of a number of actions designed to limit pollution at the Site. Shortly thereafter, in 1980, the EPA determined that the pollution was still occurring, and instituted its own cleanup. It treated and disposed of leachate at a pool at the Site, and removed numerous toxic drums. At some point in the next two years, the EPA also prepared a Remedial Investigation and Feasibility Study ("RI/FS") to determine the nature and extent of hazardous substances at the site. When plaintiffs assumed the remedial activities pursuant to a 1982 agreement with the EPA, the EPA ceased its own clean-up operations.

In 1981, the rules governing such cleanups changed, and the EPA gained a new point of leverage: CERCLA. CERCLA allocated 1.6 billion for cleanups of hazardous waste sites for which no responsible party could be found. It also authorized the EPA to institute broad measures to force owners, users, or operators of sites to clean up their sites or reimburse the EPA for any of its unilateral actions in cleaning up sites. These owners/operators/users of hazardous waste sites were referred to in CERCLA as "potentially responsible parties" ("PRPs").

In 1983, the EPA determined that the owners and operators of Kin-Buc were PRPs for the pollution, and hence were potentially liable to the EPA for EPA expenditures in its clean-up programs. on September 23, 1983, the EPA issued a unilateral administrative order pursuant to CERCLA Section 106 (the "106 Order") requiring all owners and operators of the Site, which included plaintiffs in this action, to continue the response actions they were performing since 1982, perform its own RI/FS, and operate, maintain and monitor systems to eliminate the release or threat of release of hazardous substances.[2] In May 1984, the owners and operators of the Site submitted proposed remediation plans to the EPA. The EPA selected a plan that included a variety of remedial actions for the owners and operators to undertake.[3]

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2. In March, 1986, the EPA issued another 106 Order, incorporating all the measures of the previous order and setting a deadline for completion by Plaintiffs of certain response actions.

3. These actions included: installing a slurry wall to bedrock around the Landfill; installing and maintaining landfill capping; collecting and treating leachate; and operating, maintaining and monitoring the remedial measures implemented at the Site.

In 1984, the EPA sought to collect restitution for its expenses at the Site. It wrote letters to about 360 PRP, demanding reimbursement for $4,980,398. This amount constituted the EPA's expenses regarding: 1) the leaching costs at the pool between February, 1980 and October, 1982; 2) personnel, analytical and administrative costs; 3) engineering plans for effectuating the cessation of releases at the Site; and 4) preparation of its initial Remedial Investigation and Feasibility Study.[3]

Shortly after the EPA instituted the action for response costs, a number of operators began negotiating a settlement with the EPA. Eventually, in the summer of 1988, 226 defendants joined in the settlement, agreeing to pay the EPA a total of $4.9 million. Though they were given notice of the settlement, as was required by statute,[4] plaintiffs did not join in the settlement agreement.

On August 16, 1990, plaintiffs brought this CERCLA action against 441 users and operators of the Site, to recoup their share of the expenses. This action flows out of the work plaintiffs have undertaken pursuant to the EPA's 106 Order. Plaintiffs estimate their costs to date for the work they had undertaken pursuant to the

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3. These costs involved not only the actual costs expended by the EPA in its own actions cleaning up the Site, but also its expenses in determining what remedial actions would be appropriate for plaintiff to undertake.

4. In this decision approving the consent decree, Judge Lechner specifically noted that the United States had complied with the required statutory notice provisions. Judge Lechner further declined to allow some parties, who had missed statutory deadlines for joining the settlement, to join late. See *United States v. AFP Co., Inc.*, No. 88-2087, transcript op. at 4 (D.N.J. 1990). The non-settling defendants challenge the constitutionality of the notice given them, claiming that one publication in the Federal Register is insufficient. For the reasons detailed in this opinion, I do not need to reach this question.

EPA's Order to be $13 million, and that future remedial work will exceed $100 million.[5] The settler-defendants,[6] relying on a different provision of CERCLA, contend that the consent decree they entered into with the EPA absolved them of all liability to any other PRP connected with the Site for disposal of hazardous wastes at the Site. They thus make this motion for dismissal. I will now turn to a discussion of these issues.

III. Discussion

A. CERCLA

In 1980, Congress became convinced that deposits of hazardous substances and wastes at various dump sites throughout the country posed serious problems to public health and necessitated prompt clean-up operations. See, e.g, *Dedham Water Col. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986). In response, it enacted an exceedingly complex piece of legislation called the Comprehensive Environmental Responses, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq., which authorized funds for an enormous clean-up program and presented statutory authority to hold operators of and contributors to hazardous waste sites strictly liable for the clean-up costs of remedying the situation. 42 U.S.C. § 9607. Under the statute, persons who owned or operated a hazardous waste facility, disposed hazardous substances at such facility, arranged for disposal at a facility, or who accepted hazardous substances for transport to disposal or treatment facilities could be held liable for "all costs of

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5. These figures were supplied by plaintiff in response to this Court's request for supporting materials pursuant to Rule 12(b).

6. The settler defendant group consists of over 200 of the defendants.

removal or remedial action incurred by the United States Government or a State . . . [and for] any other necessary costs of response incurred by any other person consistent with the national contingency plan." Id.

Once a site was identified as necessitating immediate cleanup, the statute explicitly provided the EPA with several remedies. It could issue an administrative order directing the responsible parties to implement response actions. 42 U.S.C. § 9606. It could apply to a district court for an injunction to compel responsible parties to abate releases of hazardous substances from the site. Finally, it could undertake remedial action itself, using funds from the Superfund provided by the statute, and then sue the responsible parties for reimbursement. 42 U.S.C. §§ 9604, 9607. See, e.g., *United States v. Rohm & Haas Co.*, 669 F. Supp. 672, 674 (D.N.J. 1987). Section 107 confined defenses to liability to those enumerated in Section 107(b).[7]

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7. Section 107(b) lists only the following defenses:

"(1) an act of God;

"(2) an act of war;

"(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

"(4) any combination of the foregoing paragraphs."

While CERCLA provided the EPA with clear authority to sue owners of and contributors to hazardous waste sites, the ability of those sued by the EPA to seek contribution costs from other potentially responsible contributors was in doubt. This was true despite the fact that Section 107 provided that PRPs can be liable to private parties that engage in clean-up operations. See, e.g. *Burlington Northern R. Co. v. Time Oil Co.*, 738 F. Supp. 1339 (W.D. Wash. 1990); see also *United States v. New Castle County*, 642 F. Supp. 1258, 1263 (D. Del. 1986) (noting that other statutes expressly created rights to contribution, but CERCLA did not). But by 1986, Congress realized that if cleanups are going to be effectuated quickly, it not only had to provide incentives for settlements with the government but also had to assure that liable parties could seek restitution from other potentially liable parties. Accordingly, Congress adopted a series of amendments to CERCLA, designed to further these two policy objectives. The first CERCLA amendment stated that "any person may seek contribution from any other person who is liable or potentially liable under section 107(a) . . . ." 42 U.S.C. § 9613(f)(1). Allocation of costs are to be governed by "such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1). By adding this provision, Congress clarified its intent to have the costs of hazardous waste cleanups shared by all responsible parties. The second provision provides that parties who have "resolved [their] liability to the United States . . . in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." 42 U.S.C. § 9613(f)(2). The purpose here is to encourage parties to settle with the government, which, in turn, served to quickly effectuate urgent clean-up operations.

Plaintiffs argue that they have a right to response costs under Section 107(b), or, alternatively, to contribution costs under Section 113(f)(1). Defendants, through this motion, contend that such claims are barred by 113(f)(2) because their settlement with the government encompassed all liability arising out of hazardous waste disposal at the Site.

B. Section 107(A)

While plaintiffs allege causes of action under both Section 107(a) and Section 107(b), in response to defendants' motion, plaintiffs initially contend that this suit is brought under Section 107(a) and, therefore, the available defenses are strictly limited as a matter of law to those enumerated in Section 107(b). Section 107(a) of CERCLA states that any owners and users of hazardous waste sites are liable for "any other necessary costs of response incurred by any . . . person consistent with the national contingency plan; . . ." 42 U.S.C. § 9607(a)(4)(B). Section 107 further states that liability is "subject only to the defenses set forth in subsection (b) of this section."[8] Thus, plaintiffs contend that since the defendants' grounds for their motion are articulated in section 113(f)(2) rather than in section 107(b), the motion must fail as a matter of basic statutory interpretation.

More specifically, plaintiffs argue that the statutory scheme divides causes of action between privately initiated cleanups and cleanups initiated under threat by the EPA. Under plaintiffs' theory, claims of the former type constitute claims for response costs under § 107, while claims of the latter type are contribution claims under § 113(f)(1). Unlike response cost claims, Section 113(f)(1)

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8. The defenses under section (b) are: acts of God, acts of war, or unforeseeable acts or omissions of third parties.

contemplated ordinary tort principles of contribution, which require a finding of joint and several liability. Section 107(a), on the other hand, is purely a statutory-created, cost-recovery remedy, with limited defenses. Plaintiffs then contend that since they voluntarily began their clean-up operation, theirs is a cost recovery action under Section 107. See also *Key Tronic Corp. v. United States*, No. C-89-694-JLQ, slip op. at 15 (E.D. Wa. Aug. 9, 1990) (CERCLA does not bar actions "to recover *privately* incurred initial response costs from a settlor PRP who has obtained contribution protection from the EPA for the final clean-up costs.")

I disagree. Prior to the 1986 amendments to CERCLA, "it was unclear whether a private right of action existed for contribution to defendants from other potentially liable parties." *Burlington Northern R. Co. v. Time Oil. Co.*, 738 F. Supp. 1339, 1341 (W.D. Wash. 1990). Congress enacted section 113(f)(1), which provides that "[a]ny person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title," see 42 U.S.C. § 9613(f)(1), to provide for fairness in situations where one party was bearing the cost of a major hazardous waste site simply because the EPA targeted it first. The clear import of this language is to allow persons situated like plaintiffs in this case to gain reimbursement for their clean-up expenditures from other PRPs -the point of Section 113(f)(1) is to share the costs among the blameworthy parties. Without this statutory language -- which plaintiffs seem to write away with their argument -- it is unclear whether they would have a CERCLA cause of action at all.

Further, plaintiffs' argument in this regard defies the meaning of "contribution." Plaintiffs contend that since there never was a

judgment issued against them, there was never legal liability to seek contribution for, and therefore its claim is not a claim for contribution. Under general legal principles, a claim for contribution is one in which one liable party attempts to recover from another potentially liable party for its share of the cost. See, e.g. *Northwest Airlines, Inc. v. Transport Workers Union of America*, 451 U.S. 77, 87-88 (1981); In Re Agent Orange Product Liability Litigation, 818 F.2d 201, 207 (2nd Cir. 1987). Absent a statutory provision to the contrary, a claim against one liable party by a party who voluntary agreed to perform certain actions pursuant to a settlement agreement is still a claim for contribution.[9] Plaintiffs present no reason why this flexible understanding of contribution should be any different under CERCLA. *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989) (when one liable party sues another PRP for its share of response costs incurred by the former, the claim is one of

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9. In *Huggins v. Graves*, 337 F.2d 486 (6th Cir. 1964), the Court of Appeals stated the reasons for this broad view of contribution:

> "[T]he principle of contribution is founded . . . upon the principles of equity and natural justice, which require that those who are under a common obligation or burden shall bear it in equal proportions and one party shall not be subject to bear more than his just share to the advantage of his co-obligor. . . . [W]hile a judgment is conclusive on this issue it is not necessary that it be proved in that way. If a judgment has not been rendered, the validity of the claim against both of the parties can be determined by the Court in the action seeking contribution."

Id. at 489. Ironically, the argument that a claim is not one for contribution in the absence of a legal judgment ordinarily is made by the defendants, who claim that they took no part in the settlement and may have opposed it yet still have to share it. See Prosser and Keeton on the Law of Torts at 339 (Lawyer's Ed. 1984). Here, the defendants not only are not making this argument, they are emphatically contending that plaintiff's claim is one for contribution.

contribution.) In other words, plaintiff's 107(a) action against defendants is authorized by section 113(f)(l)'s contribution provisions, for precisely the reasons that plaintiffs articulate the need for this action. In fact, when properly construed, the two sections work together, one governing liability and the other governing contribution from those found liable. First, the plaintiff must show that the defendant has incurred section 107(a) liability. Then, it can sue for contribution under section 113(f)(1). *Amoco Oil*, 889 F.2d at 672.

Moreover, even if I accepted plaintiff's distinction between response costs and contribution costs, I find that plaintiffs are being facetious at best in their argument that it acted voluntarily, privately, and in keeping with the goals of CERCLA, and not as a result of government threats. Their argument, if accepted, would drain the words "voluntary" and "contribution" of any meaning whatsoever. In 1983, the EPA issued a unilateral administrative order pursuant to CERCLA section 106 directing plaintiffs and others to continue remedial measures to clean up the Site and ordering them to design, implement, maintain and monitor for thirty years the final long-term remedial action selected by the EPA for the landfill. These actions by plaintiff clearly are the result of civil actions by the government. If plaintiff failed to comply with the agreements it made with the government, they would be directly liable in the form of civil fines or additional injunctive orders. Action under such threats is hardly "voluntary." (Contrast with *Key Tronic*, slip op. at 2 ("Key Tronic alleges that it incurred, *at its own initiative*, expenses totaling $1,271,511.10 . . . .") (emphasis added.))

Even if I was, however, to treat plaintiff's suit against defendants as purely a section 107 action, and even if I accepted

their claim that they acted voluntary, the Third Circuit has explicitly rejected the argument that the defenses enumerated in section 107(b) are exclusive. *Smith Land & Imp. Corp. v. Celotex Corp.*, 851 F.2d 86, 89 (3rd Cir. 1988). In *Smith Land*, a present owner of a landfill sued a former owner for contribution. The Third Circuit recognized that section 107 is inexorably linked with section 113, and hence found that the defenses enumerated in section 107(b) are not exclusive, but extend to include § 113(f)(2). The holding is not only controlling; it is persuasive -- CERCLA, including the original statute and the amendments, must be read in its entirety, as a single Congressional response to the problem of hazardous waste and a program for remedying the current situation. A section 107 claim by a party liable to the government for contribution from other PRPs can only be understood in light of all the relevant statutory provisions.

Thus, plaintiff fails in its argument that since its claim is authorized by Section 107, it is not subject to a Section 113(f)(2) defense.

This by no means ends the inquiry; rather it changes the focus to whether section 113(f)(2) merits dismissal of the claims against the settler-defendants. And defendants next claim that section 113(f)(2) provides immunity from liability for all matters covered by the consent decree.

C. Section 113(f)(2)

Defendants argue that they have an absolute defense to plaintiffs' claim for contribution, under 113(f)(2). Section 113(f)(2) states that a "person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding

matters addressed in the settlement." 42 U.S.C. § 9613(f)(2). By its very language, Congress enunciated a strong desire for settlements as the best means to effectuate the goals of CERCLA, concluding that immunity from contribution liability would be the proverbial "carrot" to coax parties into settling. See, e.g., *United States v. Rohm & Haas*, 721 F. Supp. 666, 677 (D.N.J. 1989) ("By enacting section 113(f)(2) . . . Congress has plainly indicated that non-settling defendants' contribution claims will be barred."); *Smith Land*, 851 F.2d 86, 89 (3d Cir. 1988) (section 113(f)(2) absolves settling parties from claims of contribution.) Defendants argue that a primary policy behind the 1986 amendments to CERCLA was to encourage settlements by forcing non-settling parties to risk bearing an inequitable share for the cost of cleanup as a consequence of their unwillingness to settle with the government. Accordingly, they contend that to encourage them to settle, the EPA granted them the "carrot" of absolution from any further responsibility to clean up the Site. Plaintiffs, though, they contend, are paying for their unwillingness to join the settling defendants.

To evaluate the defendants' motion to dismiss, I must evaluate the terms of the consent decree itself.[10] If a material fact about the scope of the consent decree is in dispute, the motion must be denied. *Todaro v. Bowman*, 872 F.2d 43, 46 (3d Cir.), cert. dism'd 483 U.S. 1052 (1987).

The Consent Decree states its purpose to be "the recovery of all response costs that have been incurred by the United States in response to alleged releases and threatened releases of hazardous

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10. See *Allied Corp. v. Frola*, 730 F. Supp 626, 638 (Section 113(f)(2) provides immunity from suits for contribution regarding all matters addressed in the consent decree.)

substances from the Kin-Buc Landfill." Consent Decree at 8. In return for the settling parties agreement to pay the past response costs, the Decree provided that:

> the United states is agreeable to their so doing in full satisfaction of all claims of the United States with regard to Past Response Costs and Past Response Actions [and] to covenant to limit civil suit and administrative process against the Settling Parties for any Future Response Actions and any Future Response Costs which may be incurred by the United States in connection with the Kin-Buc Landfill.

Con. Dec. at 12-13. Particularly, the document worked to

> extinguish the United States' claims for Past Response Costs and Past Response Actions and shall be full and complete satisfaction of the Settling Parties' liabilities under CERCLA, or under any other statute or common law, with respect to Past Response Costs and Past Response Actions and for any administrative costs and civil penalties which may have accrued prior to April 30, 1987, and for interest on such sums which may have accrued prior to September 22, 1987, with regard to the Kin-Buc Landfill.

Con. Dec. at 16. Defendants point out that the aforementioned language is extremely broad. Therefore, they argue, it extends beyond the bounds of the government's suit and absolves them of other response costs. Yet this language must be read in light of the action taken by the United States, the complex situation of this case, the policies behind CERCLA, and, most importantly, the matters the decree settles. In light of these factors, the defendants' claim is untenable, for defendants' argument conflicts with the language of the consent decree itself, the reasonable expectations of the parties entering into the consent decree, the interpretation of the

consent decree by the judge who authorized it, and the policies behind the relevant federal statutes.

1. Language of and expectations of agreement

First, the agreement states that "the United States intends and expects that the Kin-Buc 106 Orders shall remain in full force and effect against the Owners/Operators and that said Orders shall result in the abatement of release and threat of release into the environment of hazardous substances at the KinBuc Landfill." In other words, the agreement itself acknowledges the separateness of the prior arrangements with plaintiffs. If defendants' arguments were correct, the government could not reasonably expect those agreements to remain in force, since the plaintiffs, who were the parties to that agreement, could have joined the consent decree and thereby extinguished those agreements. (See supra.)

Second, the agreement clearly states that it covers "incurrence of costs through April, 30 1987, and interest on such costs through September 22, 1987, by the United States totalling $4,980,398." It is in regard to these actual costs, incurred by the United States, that the United States agreed to find the settling defendants "in full satisfaction of all claims of the United States." The consent decree thus covers the actual costs of $4.9 million and absolves defendants of liability for other remedial costs determined by the United States to have arisen from the relevant time period.

Third, the "covenant to limit civil suit and administrative process against the Settling Parties for any Future Response Actions and any Future Response Costs which may be incurred by the United States in connection with the Kin-Buc Landfill . . . only means that "the United States shall not take such action against the settling parties until after having made all reasonable efforts to

compel non-settling PRPs to implement future response actions." *AFP Co., Inc.*, at 6. In no way was the government absolving defendants from all liability to any other party for the ongoing problems at the Site.

In light of these facts, it would be unreasonable for defendants, who are responsible for a large percentage of the problems at the Site, to have expected the agreement to completely absolve them of a problem that is far from over.

2. Judge Lechner's opinion

Further, defendants' interpretation of the consent decree is at odds with statements of the judge who approved the decree. In that opinion, Judge Lechner noted that "[t]he settling parties' agreement to pay the United States almost five million dollars implements the underlying cost recovery scheme of CERCLA by replenishing the Superfund promptly." *AFP Co., Inc.* at 9. This can only be interpreted to mean the consent decree covers the expenditures at the Site incurred by the EPA. Moreover, in response to a concern by a non-settling party, Judge Lechner held that "as long as [a non-settling party] complies with its legal obligations . . . (it] may seek contributions from the settling parties." *Id.* at 17. A judge approving a consent decree in a CERCLA case is mandated to take into account the equities of the situation. He or she cannot approve a consent decree that is simply unjust or unfair. Given Judge Lechner's own equitable interpretation of the decree he approved, it would be illogical for this court to hold that as a matter of law, a contrary, inequitable interpretation, governs.

3. Policies of CERCLA

Finally, defendants' argument that a broad reading of the consent decree best comports with the policies behind CERCLA and its accompanying amendments is simply wrong. Defendants argue that since CERCLA contemplates punishing responsible parties for refusing to settle with the government, reading the consent decree to absolve defendant from any other contribution costs for cleaning up the Site accomplishes this. To take the defendants' arguments to their logical conclusion, let us imagine the result if the plaintiffs *had* agreed to settle:

In this case, the government's claim is for past response costs totalling $4.9 million, for the money it spent cleaning up the Site. This occurred alongside agreements between the EPA and plaintiffs for the plaintiffs to spend their own money to engage in various other clean-up activities, at past and future costs totalling over $30 million. According to defendants' argument, if plaintiffs joined the consent decree and settled the claims, then as a matter of law, the plaintiffs would be free of the requirements of prior agreements they had entered into for engaging in remedial actions to clean up the Site. In other words, by agreeing to pay a portion of $4.9 million to the government, the plaintiffs would have been able to extinguish their responsibility to engage in clean-up activities costing over $100 million. Such a result is at adds with the policies behind CERCLA of making the responsible parties pay for the clean up of hazardous waste sites. Settlement payments of $4.9 million for clean-up costs exceeding $100 million would do little to further the goal of allocating responsibility among parties who were in fact responsible, and of allocating responsibility equitably and proportional to the amount of harm done by each party. Such an agreement would not meet Congress's goal of expediting

"effective remedial action and minimiz[ing] litigation." 42 U.S.C. §9622(a); *United States v. Rohm & Haas*, 721 F. Supp. 666, 677 (D.N.J. 1989). Moreover, to interpret the agreement to absolve defendants of responsibility for additional clean-up actions costing ten times more than that amount, defies the goal of encouraging parties to unilaterally engage in cleanup operations. As one court has noted, "[i]f fair apportionment of the expense is not assured, it is unlikely that one party will undertake remedial action promptly when it could simply delay, awaiting a legal ruling on the contribution liability of other responsible parties." *Smith Land*, 851 F.2d 86, 90 (3rd Cir. 1988).[11]

Defendants correctly point out that one of the risks that non-settling parties take is the possibility of winding up shouldering

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11. In support of their argument, though, defendants rely on *U.S. v. Rohm & Haas Co.*, 721 F. Supp. 666 (D.N.J. 1989) and *United States v. Bell Petroleum Services, Inc.*, 1990 U.S. Dist. Lexis 14066 (W.D.T. 1990). In *Rohm & Haas*, the defendants settled claims for actual EPA expenditures, which plaintiffs argued prevented them from obtaining contribution for those very expenditures and thereby violated equitable principles because the proportion of costs shared was inequitable. Specifically, EPA had expended approximately $65,270,000 in its clean-up efforts. Id. at 671. The government entered into a consent decree with ten de minimis defendants (defendants who were each responsible for less than 1% of the damage to the site) and found them liable in total for $3,034,807. Id. at 672. The case only held that those defendants could not subsequently be held liable for any additional proportion of the $65,270,000 -- they were immune from any additional contribution liability.

In *Bell Petroleum*, the court approved a consent decree absolving the settling parties for contribution liability. However, the court was primarily moved by the fact that settling defendants were on the verge of bankruptcy, and that if the court did not approve the consent decree "it is unlikely the Government would receive any amount of money from [defendants] Bell or Regal in the end." *Bell Petroleum* at 5.

a disproportionate share of the clean-up costs. See, e.g., In Re Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1027 (D. Mass. 1989). But this is only with respect to the claims specifically addressed in the consent decree, not to every possible claim arising out of the same site. In other words, Section 113(f)(2) prevents parties from having to pay twice for the same cleanups. Thus, defendant is immune from further liability for the response costs incurred by the United States during the time period covered by the consent decree; defendants are not to pay twice for these response costs, even if the government later determines that it underreported those actual costs. Paying twice for the claim sued upon would in essence penalize the defendants for settling and reward the plaintiff for holding out. This would directly violate the policies behind the amendments to CERCLA. But in this case, defendants, even if they lose, paid only once for the costs incurred by the EPA.

This holding in no way inhibits Congress's policy of encouraging settlements -- there is still strong incentive for settling for a much lesser amount than what the government is suing for. Thus, in the instant case, if defendants settled for $1 million, even though the suit was for $5 million, and even if they actually were responsible for a much greater share of the damage, plaintiffs could not gain contribution for any other portion of the $5 million. Their unwillingness to settle would have cost them that loss. Such are the situations in the cases defendants rely upon. It is not the situation in this case.

The defendants' motion for summary judgment must therefore fail because as a matter of law, the consent decree entered into by defendants only covers the past response costs and past response actions incurred by the United States. The problems at Kin-Buc are

enormous and expensive, and defendants cannot escape responsibility for a potential $100 million by settling with the government for $4.9 million.

DEFENDANT CLAIROL'S MOTION

In a related action, defendant Clairol moves to strike the plaintiff's claims against it[12] for the following reasons: 1) plaintiffs' amended complaint violates Rule 8(e) by failing to be clear and concise; 2) plaintiffs did not comply with specific nexus information requested by Magistrate Chesler, by Order of December 19, 1990, thus warranting a dismissal of plaintiff's pleading pursuant to Rule 16(f); 3) plaintiffs, pleading violates Rule 11 because they have no objective good faith basis to believe Clairol is liable. Alternatively, Clairol moves for summary judgment under rule 56(b). I will now turn to each of its arguments.

I. Rule 8(e)

First, defendants claim that plaintiff's complaint violates Rule 8(e), which reads that "[e]ach averment of a pleading shall be simple, concise, and direct." Fed. R. Civ. P. 7. Defendants rely on *Gordon v. Green*, 602 F.2d 743 (5th Cir. 1979), and *Martin v. Hunt*, 29 F.R.D. 14 (D.Ma. 1961) for their contention that the complaint must be stricken.

Defendants ignore a wealth of case law, including the principles articulated in the cases they rely on, interpreting Rule 8 very liberally. Rule 8 is intended to "eliminate prolixity in pleading and to achieve brevity, simplicity, and clarity." 602 F.2d at 746 (citing *Knox v. First Security Bank of Utah*, 196 F.2d 112, 117 (10th Cir. 1952), in other words, to ensure that complaints are understandable, fair and amenable to response. Only complaints that

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12. The relevant portion of plaintiffs' amended complaint reads: "The defendants named are each PRPs as generators and/or transporters and/or haulers of various chemical substances, including hazardous substances, to the Kin-Buc Landfill Site...."

clearly violate this standard should be stricken. In *Gordon* itself, the violative complaint was so garbled, wordy and confused that Chief Judge Brown titled the first section of his opinion "The Pleadings: Gobbledygook." 602 F.2d at 744. The various complaints and amendments totalled over 4,000 pages, contained sentences running full legal pages and was, as the Court put it, "verbose and scandalous." Id. at 745. Judge Brown was quick to point out, though, that "we do not recede even one inch from the position expressed by this Court . . . and a host of other cases sounding an approach of liberality . . . ." Id. at 746. Similarly, the court in *Martin v. Hunt*, 29 F.R.D. 14 (D. Mass. 1961), also relied on by defendants, described the complaint as containing "scandalous and vituperative" material. In other words, the case law consistently holds that in order to warrant dismissal of a case as a violation of Rule 8(e), the complaint must reach a level of outrageousness that far exceeds what is alleged here. While arguably lacking in detail, the complaint is clear and concise enough for defendants to understand the nature of the complaint and be able to respond and defend itself.

II. Rule 16(f)

Next, defendants argue that plaintiffs violated magistrate Chesler's Case Management Order No. 1 of December 19, 1990. The Order demanded that plaintiffs to provide:

> a good faith effort, by way of preliminary presentation, without obligation to perform definitive or exhaustive review of material, and without prejudice, a detailed description of the hazardous substance(s) . . . which such defendant allegedly transported or generated to the Kin-Buc Landfill site.

Rule 16(f) states that "if a party . . . fails to obey a scheduling or pretrial order . . . the judge, upon motion . . . may make such orders with regard thereto as are just . . . " Cases that have been dismissed for violating this Rule universally have involved complete disregard of Court orders. For example, in *Goforth v. Owens*, 766 F.2d 1533 (1985), relied on by defendants, the plaintiff did not submit to the court a medical statement that he was ordered to submit. Id. at 1534. As the court said, "the (district] court could have used the sanction of dismissal to punish counsel for his disregard of the court's orders to submit (the statement.]" Id. at 1535. See also *Titus v. Mercedes Benz of North America*, 96 F.R.D. 404, 405 (1982) (dismissing complaint for willful violation of court order); *Lockhart v. Patel*, 115 F.R.D. 44 (E.D.Ky. 1987) (striking pleadings of the defendant for "deliberately (refusing] to obey the order of the court").

In this case, the plaintiffs responded point by point to the Nexus order, alleging that Clairol was "(i) a generator; who (ii) supplied Waste Water, Processed Water Waste, Ink and Dye Waste, and Water Wash & Detergent . . . ." By clear implication, plaintiffs are alleging that Waste Water, Processed Waste Water, Ink and Dye Waste, and Water Wash and Detergent are hazardous substances. At this point in the case, when the same Case Management order limited the ability of plaintiffs to discover defendants' records, it is not unreasonable to respond as did plaintiffs. They did not flagrantly violate or ignore the order; they cannot be held liable "for conduct which unreasonably delays or otherwise interferes with the expeditious management of trial preparation." Id. at 1535. See also *In re Baker*, 744 F.2d 1438, 1441 (10th Cir. 1984).

III. Rule 11

Next, defendant contends that the pleading violates Rule 11's good faith requirement. Under Rule 11, an attorney must certify "that to the best of his knowledge, information and belief formed after reasonable inquiry, the claim is well grounded . . . in fact and in law." The test is reasonableness: By signing the complaint, attorneys for plaintiff are stating their belief that the complaint is grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." F.R.Civ. P. 11. Defendant simply has not presented evidence that plaintiff's allegations violate this standard. Plaintiffs' relied upon the following facts: 1) Clairol settled a claim by the EPA for contribution for government clean-up expenditures at the Site"[13]; 2) the wastes alleged by plaintiffs to be hazardous were in fact deposited at the Site. While defendants contend that the claim it settled with the EPA was simply a payment of "nuisance money," that contention is simply not enough to show a violation of Rule 11.

IV. Summary Judgment Motion

In the alternative, defendants move for summary judgment, under Rule 56(b). I have outlined the standard for summary judgment above. Clairol has not met its burden of showing that there is no issue of material fact in dispute.

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13. Clairol claims this settlement was a nuisance money; at this stage, this is by no means self-evident.

In this case, Clairol essentially claims that it has not deposited hazardous waste products at the Site and that there is no evidence on the plaintiff's part to contest this. It points out that in several past cases, Clairol has been accused and subsequently acquitted of disposing hazardous waste at sites, and that the same waste products are at issue here. But even relying solely on Clairol's own accompanying affidavits, material issues of fact remain as to whether Clairol has deposited hazardous waste products at the Site. Exhibit B of an affidavit by Mohamed H. Tarifi, a Clairol employee, lists a series of compounds that "May be Present in Clairol Concentrate Waste." Among these are "ammonia" and "Ethyl, Lauryl, & Other Ethers." As plaintiffs correctly point out, both of these are listed by the E.P.A. as hazardous substances under CERCLA. 40 C.F.R. § 302.4. In its reply brief, Clairol dismissively states that "as any simple textbook analysis would disclose, ammonia very rapidly becomes neutralized and turns into a harmless salt." The claim is that ammonia cannot "possibly generate response costs," but the fact is that the EPA has listed ammonia as a hazardous substance[14].

Even if this contention about ammonia was persuasive, Clairol's argument about ethyl ether is clearly disingenuous. It contends that the item "Ethyl and Other Ethers" in Appendix B refers only to the chemical prefix "ether" and not to Ethyl Ether, the compound contained in the EPA's list. Yet the only reasonable interpretation of the language "Ethyl, Lauryl, & Other Ethers" is

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14. See *U.S. v. Alcan Corp.* 1992 U.S.App. Lexis 10366 at 22 (3rd Cir. May 14, 1992) (To be hazardous under CERCLA, "the substance under consideration must simply fall within one of the designated categories.").

that the items referred to are Ethyl Ether, Lauryl Ether and Other Ethers. In another affidavit, Clairol nonetheless claims that its products contain no ethyl ether, but the contradictory statements in its supporting materials create enough questions to deny a motion for summary judgment. The opposing party to a motion for summary judgment bears the burden of responding *"only after* the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 321 (1986) (quoting *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181, 183, n. 3 (D.C. Cir. 1985). Defendants have not met this burden.

Moreover, summary judgment generally should not be granted before an opportunity for discovery. See, e.g. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In a complex case such as this, in which much of the evidentiary material is in the depositors hands, discovery is all the more imperative. See, e.g., *United States v. Price*, 577 F.Supp. 1103, 1115 (1983) ("Most courts are reluctant to grant summary judgment prior to the termination of discovery . . . . [I]n situations . . . where a plaintiff must obtain a good deal of information from the opposing party, judgment should be withheld until the discovery process has been completed.") Therefore, the motion for summary judgment is denied.

CONCLUSION

For the foregoing reasons, the settler-defendant's motion to dismiss and defendant Clairol's motion to strike the complaint, or in the alternative for summary judgment, are denied.

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

TRANSTECH INDUSTRIES, INC., et. al. :

Plaintiffs : Civil Action No. 90-2578

v. : ORDER

A & Z SEPTIC CLEAN, et. al. :

Defendants. :

Ackerman, D.J.

This matter having come before the court on _____ by a class of settling defendants for partial summary judgment pursuant to Fed. R. Civ. P. 56(b), and a motion by defendant Clairol to strike the complaint or in the alternative, for summary judgment pursuant to Rule 56(b); and this court having fully considered the submitted

briefs and the record before it; and for the reasons expressed in my opinion issued this same day: and for good cause shown;

IT IS ON THIS 30th day of July, 1992

ORDERED that the settling defendants' motion for summary judgment is denied; and it is further

ORDERED that defendant Clairol's motion to strike the complaint is denied; and it is further

ORDERED that defendant Clairol's motion for summary judgment pursuant to Rule 56(b) is denied.

/s/ Harold A. Ackerman
Harold A. Ackerman,
United States District Judge

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

TRANSTECH INDUSTRIES, INC., et. al.	:	
Plaintiffs	:	Civ. No. 90-2578 (HAA)
v.	:	OPINION
A & Z SEPTIC CLEAN, et. al.	:	
Defendants.	:	

ACKERMAN, District Judge:

This action comes before the court upon a motion by the "settlor-defendants" ("defendants" or "settlor-defendants") for reargument of Section III(c) of this Court's July 30 Opinion denying the settlor-defendants' motion for summary judgment, or, in the alternative, to certify the matter for an interlocutory appeal to the Third Circuit.

For the reasons outlined below, both motions are denied.

I. Background

For the past several years, plaintiffs have been under orders from the Environmental Protection Agency to clean up the Kin-Buc toxic waste site in New Jersey. In 1990, plaintiffs sued hundreds of defendants for contribution costs pursuant to the Comprehensive Environmental Response Control and Liability Act ("CERCLA"). About 200 of the defendants then moved to dismiss the Complaint against them because, they contended, they previously had resolved their liability to the Government for all clean-up costs related to the Site, and therefore they were immune from contribution liability pursuant to CERCLA Section 113(f)(2). Section 113(f)(2) provides immunity from contribution liability for all parties that settle with the Government, for all the matters covered in the Consent Decree. Because the parties relied on documents other than those in the pleadings, I elected to treat the motion as one for summary judgment, and the parties were asked to submit appropriate papers.

On July 30, 1992, I issued a ruling denying the settlor--defendants' motion for summary judgment, on the grounds that the Consent Decree entered into with the Government by the settlor--defendants did not cover the contribution costs sought by plaintiffs. The settlor-defendants now move for reargument of that decision, or in the alternative, to certify the issue for interlocutory appeal. I address these motions in turn.

II. Discussion

A. Motion for Reconsideration

Local Rule 12(I) provides that reargument may be granted "when there is some dispositive decision or principal of law which has been overlooked, or when there has been a misapprehension of material facts." Reargument should not be granted when a party disagrees -- however vehemently -- with the Court's decision, and should not be granted when the moving party simply rehashes arguments made before the Court upon the original motion.

In this case, the settlor-defendants claim that (1) this Court misapprehended material facts about the nature of the Government's lawsuit that resulted in the Settlement Agreement and about the costs at the Site; (2) this Court overlooked a controlling principle of law in reaching its decision. Because the "facts" allegedly overlooked are not "material" and because the "controlling principle of law" allegedly overlooked involves not an oversight by the Court but simply a disagreement between the Court and the settlor-defendants about what was covered in the consent decree, I am prepared to deny the motion outright. But the Settlor-Defendants, in their moving papers, essentially accuse the Court of engaging in result-oriented decision-making in its decision on defendants' motion. This accusation is totally devoid of merit. Nevertheless, in the interest of justice, I will address defendants arguments in turn.

First, defendants contend that this court misapprehended the breadth of the government's suit. They assert that the Government sued for all past and future response costs at the site. However, in its Opinion on this case, this court found that when tracing the history of the Site, the Government's suit was based on the costs it incurred at the Site and any future costs *the Government may occur*

related to its expenses at the Site. Prior to seeking restitution from defendants in May 1984, the EPA issued an administrative order pursuant to CERCLA § 106 (the "106 Order"), requiring plaintiffs to clean up the Site. Once plaintiffs assumed responsibility for future clean-up of the Site, the EPA ceased its clean-up activities. Its only concern then was to acquire restitution for its past costs -- the bulk of the work at the Site was already to be taken care of by plaintiffs. In fact, the Consent Decree entered by the Government and the Settlor-Defendants states that "the United States intends and expects that the Kin-Buc 106 Orders shall remain in full force and effect against the Owners/Operators [plaintiffs] and that said Orders shall result in the abatement of release and threat of release into the environment of hazardous substances at the Kin-Buc Landfall." Thus, recognizing the separateness of the plaintiff's duty to clean up the Site, the EPA sought from defendants restitution and declaratory relief for any future costs it may incur related to its expenses at the Site. The Government was not seeking in any way to determine the settlor-defendants' liability for remediation costs to be incurred by other private parties. Any other costs besides the $4.9 million were purely hypothetical at the time of the Government's suit -- despite the fact that plaintiffs were responsible for actual clean-up costs, though of an unknown amount. This should at any rate, be clear since the Government provided in the consent decree that the approximately $4.9 million received from the Settlor-Defendants was in satisfaction of its prior expenses by the Site, and that the Settlement covered any further such costs the Government *may* incur. It seems beyond logic that the Government -- suing for and receiving the identical amount of its own clean-up costs--would gratuitously exonerate defendants from any further liability for all clean-up costs at the Site.

At any rate, even if the moving defendants were correct on that point, the scope of Settlor-Defendants immunity is governed by the Consent Decree, not the lawsuit. 42 U.S.C. § 9613(f)(2) ("a person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed *in the settlement.*" (emphasis added)). As I explained in my earlier Opinion, the text of the Consent Decree itself, the interpretation of the judge who approved the settlement, and the policies behind CERCLA all favor this court's interpretation of the settlement.

Second, the defendants argue that the court overlooked the fact that when a party resolves its liability to the Government, it also resolves its liability to all other relevant parties. However, defendants ignore the language of section 113(f)(2), which clearly allows immunity only for matters *addressed in the settlement.* This court found that the Consent decree covered costs incurred at a particular point in time and future hypothetical Government-incurred costs. Defendants' reliance on language in *Smith Land Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 89 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989) ("A party which has resolved its liabilities to the government is not liable for contribution . . . .") is misplaced. The Court of Appeals' statement was made in the context of a suit for restitution of costs of a *completed* clean-up; no discussion of left-over clean-up matters was necessary. Therefore, the Third Circuit, while certainly aware of the limiting language in Section 113(f)(2) -- that immunity is provided only for matters addressed in the Settlement Agreement -- obviously saw no need to quote that part of the statute. In this case, if the United States engaged in more on-site clean-ups, and obtained contribution from other parties, the settlor-defendants would be immune from contribution suits by those other parties. Under

defendants' interpretation of *Smith Land*, the Government would never be able to sue solely for particular expenses related to the unfinished clean-up of a Site. Therefore defendants' contention that this Court overlooked controlling law amounts to nothing more than a strident allegation that this Court disagreed with defendants' argument.

Third, the defendants argue that this court misapprehended Judge Lechner's opinion approving the Settlement Agreement between the Settlor-Defendants and the Government -- particularly this Court's finding that Judge Lechner held that the Settlement Agreement allowed private contribution actions. Defendants' arguments here amount only to a rehash of their prior arguments, which were rejected by this court in its interpretation of Judge Lechner's opinion, and are not proper on a motion for reconsideration, *see Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983). However, since defendants' accuse this Court of "distorting" a passage in Judge Lechner's Opinion to reach the result it wanted, I will address their main argument. The passage in question, quoted in its entirety, reads as follows:

> Thus, as long as Earthline (a non-settling party] complies with its legal obligations and no action is brought against it by the United States, paragraph 8(c) [which requires the Government to oppose an attempt to join the Settlor-Defendants to an action commenced by the Government against the plaintiffs] will not apply and Earthline may seek contributions from the settling parties without opposition from the Government.

Defendants argue that the language "does *not* state or even imply that any such attempt would be free from a challenge *by the Settlor-Defendants* as being precluded by operation of Section 113(f)(2)."

(emphasis in original). Defendants' argument, then, is that Judge Lechner simply said that Earthline could theoretically seek contribution, but would fail if they tried. I find that interpretation difficult to believe. Judge Lechner clearly -- even when quoted at length -- interpreted the Consent Decree to allow private contribution suits. According to Judge Lechner, as long as Earthline was meeting its burdens of clean-up under the law, it could sue for contribution costs. (Defendants' counsel makes its argument here by quoting Judge Lechner's allegedly misrepresented statement in CAPITALIZED BOLD letters. This not-too-subtle attempt to accuse this Court of misstating the record is a sad commentary on counsel's perception of its professional responsibilities. If one wanted to be cynical, one might draw the conclusion that defendants' counsel was engaging in intimidatory behavior. This Court would prefer to believe that counsel's warped desire to win its argument at any cost has merely clouded its judgment.)

Defendants next argue that the court exceeded its authority by reexamining the fairness of the Settlement Agreement. Specifically, defendants point to the Court's basing part of its argument on plaintiffs' current estimate of its costs in cleaning up the Site. Indeed, in the Opinion, I noted that "defendants cannot escape responsibility for a potential $100 million by settling with the government for $4.9 million." In fact, defendants argue, the estimate at the time of the consent decree was about $41.5 million. The point, however, was that plaintiffs' burden in cleaning up the Site was potentially enormous -- conceivably ever-growing and at any rate much more than costs borne by the Government in its limited actions at the Site. The $100 million figure was simply evidence to support this court's interpretation of the Consent Decree, the document that essentially governs the outcome of the

Summary Judgment motion; this court engaged in no reexamination of the settlement's fairness.

Finally, defendants argue that shortly before the decision came down, the Settlor-Defendants received a document from the EPA that put the entire remediation costs at Kin-Buc at $36.6 million, rather than $100 million. The point is well taken, but ultimately not dispositive of the motion. First, plaintiffs dispute this fact, contending in its brief in response to defendants motion that the Settlement Decree covered only 5% of the costs of remediation at the Site. Second, the unfairness argument was but one prong of a multi-layered analysis of why the language of the Consent Decree, Judge Lechner's interpretation of the Consent Decree, the statutory provisions, and the policies behind CERCLA and its amendments all point to interpreting the Decree in the way that this court did. Finally, all that this shows is that plaintiff's costs are indeterminable at this time.

Defendants motion for reconsideration is denied, and this Court's prior Order is affirmed and its prior Opinion affirmed and clarified in accordance with this opinion.

I now turn to Defendants motion to certify the question for interlocutory appeal.

B. Certification for Interlocutory Appeal

An issue may be certified for interlocutory appeal when it (1) involves a controlling question of law for which; (2) there is substantial ground for difference of opinion; and (3) an immediate appeal may materially advance the ultimate termination of the litigation. Only when all three of these factors are present may a district court certify a question for interlocutory appeal. *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 754 (3d Cir. en banc); cert

denied, 419 U.S. 885 (1974). As plaintiffs point out, certification is the exception and not the rule, and should be granted sparingly.

Defendants propose, as examples, the following issues for appeal:

> (1) Whether a judicially approved consent decree resolving the settling parties' liability to the Government in an action commenced by the Government seeking the full clean-up costs at a site that releases the settling party from any liability for past response costs and provides a covenant by the Government not to sue or commence any administrative action against the settling parties for future clean-up costs at the site addresses both past and future clean-up costs within the meaning of 42 U.S.C. §9613(f)(2); and
>
> (2) Whether a judicially approved consent decree settling an action commenced by the Government for the full clean-up costs at a site that resolves the settling parties' liability to the Government by releasing the settling parties from any liability for the Government's past cleanup costs and providing a covenant by the Government not to sue or commence any administrative action against such settling parties for any future clean-up costs at the site so long as the Government is able to obtain the same from non-settling parties (which the Government has been and continues to be able to do) provides contribution protection to settling parties under 42 U.S.C. §9613(f)(2) against claims by non-settling parties for clean-up costs at the Site.

While defendants are correct in their argument that if this Court's decision was reversed by the Third Circuit, this litigation would be cut short with respect to the moving parties, and while at a very general level the issues here involve the application of CERCLA Section 113(f)(2), the crucial part of this Court's decision on the settlor-defendants' motion involved a question of fact.

Actually, despite defendants' hostile briefs, the Court and the defendants are generally in agreement on the controlling law. The only remaining issue is the scope of the consent decree. I found in the original opinion that the language of the consent decree, the interpretation of the Consent Decree by Judge Lechner, and my close reading of the Consent Decree in light of the policies behind CERCLA and the factual scenario behind the Kin-Buc Site, clearly show that the Consent Decree was not intended to cover this contribution suit by plaintiffs. I frankly believe that it would defeat the purpose of the narrow rules for certification to certify such an issue for immediate appeal. An interpretation of the scope of a consent decree -- a task that any court interpreting Section 113(f)(2) must undertake -- is simply not such an exceptional condition to warrant certification.

CONCLUSION

For the foregoing reasons, the settlor-defendants' motion for reconsideration and for certification for an interlocutory appeal are both denied.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

TRANSTECH INDUSTRIES, INC., et. al.	:	
Plaintiffs	:	Civ. No. 90-2578 (HAA)
v.	:	O R D E R
A & Z SEPTIC CLEAN, et. al.	:	
Defendants.	:	

ACKERMAN, District Judge:

This matter having come before the Court upon a motion by the Settlor-Defendants for reconsideration of this Court's July 30 decision denying the settlor-defendants' motion for summary judgment, or in the alternative, for Certification for an Interlocutory Appeal, and this Court, having fully considered the submitted briefs and the record before it, and for the reasons expressed in an Opinion issued this same day; and for good cause shown,

IT IS ON THIS 7th day of October, 1992;

ORDERED that the Settlor-Defendants, motion for reconsideration is denied; and it is further

ORDERED that the Settlor-Defendants motion for Certification for an Interlocutory Appeal is denied.

/s/ Harold A. Ackerman
Harold A. Ackerman,
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION No. 90-2578

TRANSTECH IND. INC., Plaintiff,	:	TRANSCRIPT
	:	OF PROCEEDINGS
-vs-	:	MOTION
A & Z SEPTIC CLEAN, et al, Defendants.	:	

Newark, New Jersey
December 13, 1993

B E F O R E :

THE HONORABLE HAROLD A. ACKERMAN, U.S.D.J.

A P P E A R A N C E S :

KOZLOV, SEATON, ROMANINI & BROOKS
BY: DANTE J. ROMANINI, ESQ.
Attorneys for the Plaintiffs

SIMPSON THACHER & BARTLETT
BY: ROBERT A. BOURQUE, ESQ. and
DAVID B. SMALLMAN, ESQ.
Attorneys for Defendant Mayco Oil & Chemical Co.

THE COURT: May I have the appearances, please.

MR. BOURQUE: Robert Bourque, Simpson, Thacher & Bartlett, representing Mayco Oil and Chemical, one of the defendants in this action.

And on behalf of the 15 other defendants.

THE COURT: Robert?

MR. BOURQUE: B. O. U. R. Q. U. E., Bourque.

MR. ROMANINI: Dante Romanini, from the firm of Kozlov, Seaton, Romanini & Brooks. I represent the plaintiffs.

THE COURT: Mr. Bourque, you've been admitted before pro hac vice?

MR. BOURQUE: Yes, I have.

THE COURT: You've been admitted before pro hac vice in this case?

MR. BOURQUE: In this case, yes, I am.

THE COURT: I've read your papers, sir.

MR. BOURQUE: We're seeking a stay —

THE COURT: A stay until—have you filed your writ of certiorari yet?

MR. BOURQUE: We have not. It's due the 17th. We intend to file it on or before the 17th.

THE COURT: I read your papers, anything you want to add to your papers?

MR. BOURQUE: It is entirely in our papers, you Honor. I'd be glad to amplify anything that you'd be interest in, but I think our papers fully set forth our position.

I might note one thing, your Honor, that I'm not sure that has come up recently. There is a conference before Magistrate Chesler that's scheduled for January 14th in which further discovery will be discussed. Included expressly on the agenda is scheduling of depositions in this matter of all parties.

THE COURT: Mr. Romanini, is that the correct way to pronounce your name?

MR. ROMANINI: Yes, it is, your Honor.

THE COURT: I read your papers as well.

MR. ROMANINI: I really don't have anything to add as well. I think having gone through this once all ready we pretty much know what each side is going to do.

THE COURT: Let me say at the outset, I'm going to grant the stay. I'm going to grant the stay because, first of all, I'm aware of the fact that the Third Circuit did not feel this was an appealable order within the collateral order doctrine rule. As such, as the movants have pointed out here, and the court itself, they were disagreeing with opinions rendered by, what is it, three or four other circuits?

MR. BOURQUE: Four circuits, your Honor.

THE COURT: Four circuits. Since then the Supreme Court of the United States in a matter in which it is not precisely the same but there are certain principals of law which mirror each other. The Supreme Court in the Desk Top case—both counsel know what

case I'm talking about--has granted certiorari. Counsel for—how many defendants are there, 17?

MR. BOURQUE: 16, your Honor.

THE COURT: 16. All right. I'm up-to-date. 16 defendants have indicated—are they all going to apply for certiorari?

MR. BOURQUE: Yes, they are.

THE COURT: They're going to apply for certiorari. And I've given it a good deal of thought, I feel since they have represented they will do so, today is the 13th, so we're four days away, until that Court makes a determination as to whether it will grant certiorari in their case, or not, a stay should be given.

Would you draw an order?

MR. BOURQUE: We will, your Honor.

MR. ROMANINI: Thank you, your Honor.

MR. BOURQUE: We did submit an order with our papers, your Honor. But we'd be happy to give you another.

THE COURT: I haven't seen it. I'm sure it must be in the file.

My clerk assures me it's in the file. We'll sign it and get it off.

Thank you.

MR. ROMANINI: Your Honor, the stay is only as to the 17 parties that have applied?

THE COURT: That is correct. Only as to the 17 parties.

And counsel will notify me one way or the other as to what the Supreme Court of the United States does.

MR. BOURQUE: We'll do that, your Honor.

THE COURT: Thank you.